IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. GORDON ELLIS PRANTE, Appellant.	No. 33630-8-II UNPUBLISHED OPINION

Quinn-Brintnall, C.J. – The State charged Gordon Prante with bail jumping, alleging that he knowingly failed to timely report to jail. A Lewis County Superior Court jury found him guilty as charged, and he appeals.[1]

Issues

Both parties argue extensively about Exhibit 2, a jail record, and its accompanying testimony. The exhibit declared Prante did not report to jail on the date ordered, February 23, 2005. Prante contends the trial court erred when it admitted this evidence because it was (1) inadmissible hearsay and (2) violated his constitutional right to confront witnesses. The State contends (1) the evidence met the business records hearsay exception; (2) Prante did not

[1] Prante does not challenge his sentence.

sufficiently preserve his objection to this evidence; and (3) the trial court did not violate Prante's right to confront witnesses because any hearsay was non-testimonial.

Prante also contends the trial court abused its discretion when it admitted his prior judgment and sentence instead of allowing him to stipulate that he had a prior felony conviction. The State contends Prante insufficiently stipulated because it had to prove Prante's specific prior offense as an element of bail jumping.

Two issues emerge: (1) If the trial court erred when it admitted Exhibit 2 and the accompanying testimony, was the error harmless? (2) Did admitting Prante's judgment and sentence violate ER 403 because the danger of unfair prejudice substantially outweighed its probative value? Answering the first question "yes" and the second "no," we affirm.

Facts

Prante pleaded guilty to third degree assault and second degree malicious mischief on January 26, 2005. The superior court sentenced him to six months in jail and ordered him to report to the Lewis County Jail on February 23, 2005. Prante did not report to jail on that date. Instead, Prante reported to the jail two days later on February 25, 2005. But the jail turned him away because it had already returned Prante's judgment to the court and lacked written authority to incarcerate him.

The State charged Prante with bail jumping for failing to report on the 23rd. At Prante's jury trial, the State introduced Exhibit 2, the "declaration" of corrections officer Julia West prepared on February 24, 2005, stating that Prante had not yet begun to serve his jail sentence. At trial, West also testified that Prante had not begun serving his sentence on February 23, 2005. Prante unsuccessfully objected to admitting Exhibit 2 and West's testimony on hearsay and

confrontation grounds.[2]

To prove Prante had failed to report to serve a sentence for a class B or C felony, the State introduced Exhibit 4, a redacted[3] copy of his judgment and sentence for third degree assault and second degree malicious mischief. Prante unsuccessfully objected, offering to stipulate that he had been ordered to report because he had been convicted of unnamed felonies. The trial court instructed the jury to use Prante's prior judgment solely as evidence of "element (2)" and not to use it "for any other purpose." 1st Suppl. Clerk's Papers at 27.

Prante also presented evidence, trying to prove he did not *knowingly* fail to report. Prante, his sister, and his sister's fiancé all testified that Prante reported on February 25, not February 23, 2005. Prante testified that he believed the sentencing court told him to report 30 days after his sentencing, on February 25, 2005. His sister testified that when she had telephoned the jail, a jail officer provided the date of surrender as February 25, 2005, as well. And in closing argument, Prante conceded that he failed to report on the 23rd but argued he did not *knowingly* do so, thus arguing that the State had failed to prove the elements of bail jumping beyond a reasonable doubt.

The jury nevertheless convicted Prante as charged.

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[2] In his reply brief, Prante argues that the declaration establishing that West was a jail records custodian is hearsay and insufficient to establish that element of the business records exception. But a court may rely on hearsay evidence to answer a preliminary question under ER 104 such as whether the jail documents were business records under Title 5 RCW.

[3] The trial court removed references to domestic violence and Prante's criminal history.

Analysis

Admission of Exhibit 2

If an alleged constitutional error would be harmless, a reviewing court need not and should not resolve the constitutional question. *State v. Hall*, 95 Wn.2d 536, 539, 627 P.2d 101 (1981); *State v. Anderson*, 44 Wn. App. 644, 648, 723 P.2d 464 (1986). If a trial court has admitted evidence violating the confrontation clause that clearly could not have altered the outcome of the case, we still must affirm since any error in admitting the evidence was harmless. *State v. Guloy*, 104 Wn.2d 412, 425-26, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986); *accord State v. Smith*, 148 Wn.2d 122, 138-39, 59 P.3d 74 (2002).

Constitutional error is harmless when we are "convinced beyond a reasonable doubt that any reasonable jury would have reached the same result" without the challenged evidence. *Guloy*, 104 Wn.2d at 425; *accord Smith*, 148 Wn.2d at 139. We review the unchallenged evidence and determine whether the unchallenged evidence "is so overwhelming that it necessarily leads to a finding of guilt." *Guloy*, 104 Wn.2d at 426; *accord Smith*, 148 Wn.2d at 139. We reverse if "there is any reasonable possibility" the jury needed to use the challenged evidence to convict. *Guloy*, 104 Wn.2d at 426; *accord Smith*, 148 Wn.2d at 139.

In making this determination, we consider the *entire record*, excluding only the challenged evidence. *United States v. Hasting*, 461 U.S. 499, 509, 103 S. Ct. 1974, 76 L. Ed. 2d 96 (1983); *State v. Hieb*, 107 Wn.2d 97, 110, 727 P.2d 239 (1986). This review necessarily includes any evidence favorable to the defendant whether it was presented during the State's case in chief or by the defense during its case in chief.

Here, to decide whether the challenged evidence was harmless, we consider all the

evidence, including the evidence Prante presented. The State presented Exhibit 2 and accompanying testimony in its case in chief as evidence that Prante failed to timely surrender, an element[4] of the bail jumping charge. But Prante presented three witnesses who all testified that he reported two days late.[5] Based on Prante's evidence, there is no reasonable possibility the jury needed to use the challenged exhibit and testimony to find that he failed to timely surrender and thus committed the crime of bail jumping. Thus, any error in admitting Exhibit 2 was harmless beyond a reasonable doubt and did not prejudice Prante.[6]

Refusing Prante's Stipulation

The rules of evidence prohibit admission of relevant evidence when its "probative value is substantially outweighed by the danger of unfair prejudice." ER 403. When the State must prove the defendant has a prior felony conviction and when the defendant stipulates to an unnamed felony conviction *of the required type*, refusing the defendant's stipulation is error. *Old Chief v. United States*, 519 U.S. 172, 183 n.7, 185-86, 190-92, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997); *accord State v. Johnson*, 90 Wn. App. 54, 62-63, 950 P.2d 981 (1998). If the defendant adequately stipulates, the name of the felony and the court records proving the conviction become primarily propensity evidence and admitting them violates ER 404(b) and

[4] *See* RCW 9A.76.170(1).

[5] Prante did so as part of a valid strategy. He presented substantial evidence that he reasonably believed he reported on time. The jury simply decided that factual issue against him.

[6] As noted, Prante also claims the trial court violated the evidence rules when it admitted the challenged evidence. As we find any error harmless under the more demanding constitutional harmless error standard, we do not separately apply the non-constitutional harmless error standard.

403. *Old Chief*, 519 U.S. at 180-83, 185; *accord State v. Young*, 129 Wn. App. 468, 473-75, 119 P.3d 870 (2005), *review denied*, 157 Wn.2d 1011 (2006).

But if the defendant's proffered stipulation does not establish the element the State must prove, the trial court may admit evidence of the specific prior conviction to prove that element. *State v. Gladden*, 116 Wn. App. 561, 565-66, 66 P.3d 1095 (2003). Proof of bail jumping requires proof that "the defendant was . . . convicted *of a particular crime*" or class of crime. *State v. Pope*, 100 Wn. App. 624, 629, 999 P.2d 51 (emphasis added), *review denied*, 141 Wn.2d 1018 (2000); *accord State v. Gonzalez-Lopez*, 132 Wn. App. 622, 633, 132 P.3d 1128 (2006); *see* RCW 9A.76.170(3); 11A Washington Pattern Jury Instructions: Criminal 120.41, at 317 (2d ed. 1994).

Prante stipulated only that he had been convicted of one or two unnamed felonies. The State needed to prove he had been convicted of a particular felony or a particular class of felony. Because Prante's stipulation did not satisfy the element at issue, the State retained its burden to prove that element beyond a reasonable doubt and the trial court properly admitted the redacted judgment proving Prante's particular prior convictions. Because Prante did not adequately stipulate, the danger that the jury would use his prior judgment and sentence as prejudicial propensity evidence did not outweigh its probative value.

Conclusion

If the trial court erred when it admitted Exhibit 2 and accompanying testimony, the error was harmless because any reasonable jury would have found he did not timely surrender based on the unchallenged evidence Prante admitted. Admitting Prante's judgment and sentence instead of accepting his inadequate stipulation did not violate ER 403 because the State was still required to

prove the element beyond a reasonable doubt and because the danger of unfair prejudice did not outweigh the judgment's probative value. We affirm Prante's conviction.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, C.J.

We concur:

HOUGHTON, J.

VAN DEREN, J.